

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Mar 04, 2022

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

OKANOGAN HIGHLANDS
ALLIANCE and STATE OF
WASHINGTON,

Plaintiffs,

v.

CROWN RESOURCES
CORPORATION and KINROSS
GOLD U.S.A., INC.,

Defendants.

No. 2:20-CV-00147-MKD

PROTECTIVE ORDER

ECF No. 93

Before the Court is the parties' Joint Motion for Entry of Protective Order, ECF No. 93. The parties jointly seek a protective order to preserve the confidential nature of the documents and information that may be disclosed in this case. Pursuant to Fed. R. Civ. P. 26(c), the Court finds the entry of a protective order is appropriate in this matter.

1 Accordingly, **IT IS ORDERED:**

2 **1.** The parties' Joint Motion for Entry of Protective Order, **ECF No. 93**,
3 is **GRANTED**. The Court hereby enters the following Protective Order, the terms
4 of which the parties mutually propose and by which the parties mutually agree to
5 be bound.

6 **PROTECTIVE ORDER**

7 **1. Documents and Information Covered by this Order**

8 (a) This Order shall govern the use and disclosure of Covered Information.
9 A person producing or furnishing Covered Information is hereinafter referred to as
10 a "Producing Person." Any Party receiving Covered Information, regardless of
11 whether a Party initiated a request for the Covered Information, is hereinafter
12 referred to as a "Receiving Party."

13 (b) A Producing Person may designate as "Confidential Information" any
14 Covered Information that consists of:

- 15 (i) financial information not previously disclosed to the public;
16 (ii) material not previously disclosed to the public relating to
17 ownership or control of any non-public company;
18 (iii) business plans, product development information, or marketing
19 plans not previously disclosed to the public;
20

1 (iv) proprietary business information, or other confidential research,
2 development, or commercial information not previously disclosed to the public and
3 communications containing such information not previously disclosed to the
4 public;

5 (v) any information of a personal or intimate nature regarding any
6 individual, including but not limited to information or data defined as “personal
7 data” as that term is defined in applicable data privacy laws or regulations;

8 (vi) information for which applicable law requires confidential
9 treatment; or

10 (vii) any other category of information herein given confidential status
11 by the Court.

12 (c) With respect to Covered Information other than deposition transcripts
13 and exhibits, a Producing Person may designate the Covered Information as
14 “Confidential Information” with the marking “CONFIDENTIAL – SUBJECT TO
15 PROTECTIVE ORDER,” or with a similar marking in a way that brings its
16 attention to a reasonable examiner. For any Covered Information, such as
17 computer data, whose medium makes such a marking impractical, the compact disc
18 (“CD”) or digital versatile disc (“DVD”), CD or DVD case, and any accompanying
19 paper or e-mail cover letter shall be marked with a similar marking in a way that
20 brings its attention to a reasonable examiner. For each document marked in the

1 manner described in this paragraph, the Producing Person shall designate the
2 page(s) of each document that contains Confidential Information. Deposition
3 testimony and exhibits may be preliminarily designated as “Confidential
4 Information” on the record during the deposition. Upon such preliminary
5 designation, the Producing Person shall have twenty-one (21) days from the receipt
6 of the final deposition transcript to identify portions of the deposition transcript, or
7 exhibits to the deposition, to be treated as “Confidential Information.” Until such
8 time period expires without designation having been made, the entire deposition
9 transcript and exhibits shall be treated as “Confidential Information” as designated
10 on the record, unless otherwise specified in writing by the Producing Person. If the
11 Producing Person designates the entire deposition transcript and/or exhibits, or any
12 portion thereof, as “Confidential Information,” the designated portions of the
13 transcript and/or exhibits shall be bound in a separate volume and marked
14 “Confidential Information Governed by Protective Order” by the reporter.

15 (d) Because they will bear the mark “CONFIDENTIAL,” such Covered
16 Information shall not be disclosed to anyone except pursuant to paragraph 2 of this
17 Order. Because they additionally display the phrase “SUBJECT TO
18 PROTECTIVE ORDER,” such Confidential Information will be further protected
19 according to the terms of this Protective Order.
20

1 (e) Information derived from Confidential Information, even if incorporated
2 in another document or compilation or referred to in testimony, shall be treated as
3 Confidential and marked accordingly to the extent the information derived from
4 Confidential Information would reveal the Confidential Information.

5 (f) Designation and marking of Confidential Information in accordance with
6 this paragraph shall be deemed effective to bring such information or documents
7 under the protection of this Order. Notwithstanding the foregoing, a Party may
8 object to the designation. Such objection must be in writing and specify the
9 designated material to which the objection is made. Such a challenge may be made
10 at any stage in these District Court proceedings and failure to challenge a
11 designation at the time made shall not preclude a subsequent challenge. The
12 Parties and the Producing Person shall, within fifteen (15) days of service of the
13 written objection, confer concerning the objection. If the objection is not resolved,
14 the Producing Person must file a motion for a protective order within fifteen (15)
15 days after the end of the conferral period to preserve its designation. The
16 information that is the subject of the motion will be treated as Confidential
17 Information while the motion is pending. If no motion is filed within the allowed
18 time period, any claim that the information is designated Confidential Information
19 shall be deemed waived.

1 **2. Use and Disclosure of Covered Information**

2 (a) Unless otherwise ordered by a court, administrative agency, or other
3 governmental or regulatory body of competent jurisdiction, or otherwise provided
4 in this Order, Confidential Information received by a Party during the course of
5 this Litigation (including both the case filed by the State of Washington (No. 2:20-
6 CV-170-RMP) and the case filed by the Okanogan Highlands Alliance (No. 2:20-
7 CV-147-RMP) which have been consolidated into the current action (No. 2:20-
8 CV-147-MKD)) may be used only in connection with the prosecution or defense of
9 this Litigation.

10 (b) Except upon the prior written consent of the Producing Person originally
11 designating Covered Information as Confidential Information, upon a stipulation
12 agreed to by all Parties and the Producing Person (if not a Party), or as otherwise
13 expressly provided in this Order, no person other than the Producing Person shall
14 disclose any of the Confidential Information to any other person except to
15 individuals described in the below subparagraphs.

16 (i) the Parties to this action;

17 (ii) counsel who are engaged in the conduct of this Litigation on
18 behalf of the Parties (“Counsel”) and, to the extent necessary to render professional
19 services in connection with this Litigation, Counsel’s employees, including but not
20 limited to legal assistants, paralegals, secretaries, and clerical staff;

1 (iii) the Court, its staff, and court officials involved in this Litigation
2 (including court reporters or persons operating video equipment at depositions),
3 and any mediators and their staff appointed by the Court or agreed to in writing by
4 the Parties in the Litigation;

5 (iv) witnesses at deposition or trial to the extent necessary for that
6 purpose;

7 (v) witnesses in preparation for deposition or trial to the extent
8 necessary for that purpose;

9 (vi) outside consultants, experts, or persons contracted to serve as
10 consultants or experts in this case, including other professional and clerical staff at
11 the outside expert's or outside consultant's firm, consulting group, or company,
12 retained for the purpose of assisting Counsel in this Litigation to the extent
13 necessary for that purpose;

14 (vii) third-party contractors engaged in one or more aspects of
15 copying, organizing, filing, coding, converting, storing, or retrieving data or
16 designing programs for handling data connected with this Litigation, including the
17 performance of such duties in relation to a computerized Litigation support system,
18 but only to the extent necessary to render such services; and

19 (viii) as to any document, its author, addressee, or any other person
20 indicated on the face of the document as having received a copy of such document.

1 (c) Before disclosure of any Confidential Information is made to any person
2 described in subsections 2(b)(iv)-(vii), such person shall sign the Confidentiality
3 Affidavit attached hereto as Exhibit A. Unless otherwise ordered by the Court, in
4 the event that any such person described in subsections 2(b)(iv)-(vii) refuses to
5 sign the Confidentiality Affidavit with respect to discovery material designated
6 Confidential, no Confidential Information may be disclosed to such person except
7 with the prior written consent of the Producing Person that originally designated
8 such Covered Information and subject to any procedures that the Producing Person
9 may require to maintain the confidentiality of such Covered Information.

10 (d) Counsel for each Party shall retain their respective Confidentiality
11 Affidavit forms until such time as this Litigation, including all appeals, is
12 concluded.

13 **3. Inadvertent Failure to Designate and Inadvertent Disclosure**

14 (a) Inadvertent Failure to Designate. A Producing Person may notify the
15 Receiving Party(ies) that a document or information produced in discovery that
16 should have been designated as Confidential under the terms of this Order was
17 inadvertently produced without being designated as such. Upon receiving such
18 notice from the Producing Person, the Receiving Party(ies) shall immediately treat
19 the documents and information as if it had been so designated. Upon giving such
20 notice, the Producing Person shall promptly provide to the Receiving Party(ies) an

1 identical replacement copy with the appropriate designation on the document.

2 Upon receiving such an identical replacement copy, the Receiving Party(ies) shall
3 promptly delete and/or destroy all copies of the document without the appropriate
4 designation. No Party shall be deemed to have violated this Order if, prior to
5 notification of any later designation, such documents or information have been
6 disclosed or used in a manner inconsistent with the later designation. Once such a
7 designation has been made, however, the relevant documents and information shall
8 be treated as Confidential Information in accordance with this Order.

9 (b) Inadvertent Disclosure. If a Receiving Party discloses Confidential
10 Information to any person not authorized to receive such disclosure, the Receiving
11 Party must, upon learning that such disclosure has been made: (1) inform the
12 Producing Person that originally designated the information as Confidential of the
13 disclosure, including the facts and circumstances of such disclosure; and, (2)
14 request the return of the Confidential Information and seek to minimize any further
15 unauthorized disclosure. No person shall be deemed to have violated this Order if
16 the disclosure of Confidential Information was inadvertent and cured as provided
17 for in this section.

18 **4. Filing of Confidential Information**

19 Before filing Confidential Information or discussing or referencing
20 Confidential Information in court filings, the Receiving Party shall confer with the

1 Producing Person to determine whether the Producing Person will remove the
2 “Confidential” designation, whether the document can be redacted to remove
3 Confidential Information, or whether a motion or stipulation to seal is warranted.
4 If a motion to seal is warranted, the Receiving Party shall file a motion seeking
5 leave to file the Confidential Information under seal consistent with the Amended
6 Scheduling Order entered by the Court on February 2, 2022, ECF No. 89. Upon
7 the granting of such motion, the Confidential Information shall be kept under seal
8 until further order of the Court. The Parties will use their reasonable best efforts to
9 minimize such sealing.

10 **5. Use of Confidential Information at Trial**

11 Nothing in this Order shall be construed as limiting the right of either Party
12 to introduce Confidential Information into evidence in this case or at trial, subject
13 to the Federal Rules of Evidence and such privacy protections as the presiding
14 Judge may deem appropriate. Either Party may approach the Court before trial to
15 propose a plan for the use of Confidential Information at trial. Nothing herein,
16 however, shall prevent a Party from opposing any such plan.

17 **6. Further Requests for Production**

18 If a Receiving Party receives a request or subpoena in another litigation or
19 other matter for production or disclosure of Covered Information, they shall
20 promptly give notice by email to the Producing Person identifying the information

1 sought and enclosing a copy of the subpoena or request. Provided that the
2 Producing Person makes a timely motion or other application for relief from the
3 subpoena or other request in the appropriate forum, the Party subject to the
4 subpoena or other request shall not produce or disclose the requested information
5 without consent of the Producing Person or until ordered by a court of competent
6 jurisdiction.

7 Nothing in this Order shall be construed to require the State to violate the
8 Washington Public Records Act, RCW 42.56 (“PRA”), RCW 40.14, which
9 governs preservation and destruction of government records, or any other statute,
10 administrative rule, or court rule. Covered Information designated as Confidential
11 shall not be deemed public records unless they are also “writing[s] containing
12 information relating to the conduct of government or the performance of any
13 governmental or proprietary function prepared, owned, used, or retained by any
14 state or local agency.” RCW 42.56.010. However, if at any time the State receives
15 a request pursuant to the PRA that would compel disclosure of any Confidential
16 Information produced in this action, the State shall give written notice and a copy
17 of the request to the Producing Person. The Producing Person shall have fourteen
18 days from notification to seek protection from the Court for those responsive
19 Confidential Information, during which period the State shall not release or
20 disclose any Confidential Information.

1 **7. Order Not To Be Construed As a Waiver**

2 In addition, each Party reserves the right to move to modify the terms of this
3 Order at any time. By consenting to this Order, no Party hereto shall be deemed to
4 have waived its right to seek a protective order with respect to any documents or
5 information, regardless of whether such documents or information fall within the
6 scope of this Order, and each Party reserves the right to oppose any motion to
7 modify the terms of the Order. Nothing in this Order shall be construed as a
8 waiver of a Party's right to challenge by motion at any time whether a Producing
9 Person's designation of materials as "Confidential Information" subject to this
10 Order is appropriate and confidential treatment is warranted or whether any
11 material so designated should be filed under seal or, if so filed, should be unsealed.
12 Nothing in this Order is intended to constitute an agreement regarding the scope of
13 discovery. This Order does not constitute a ruling on the question of whether any
14 particular document or category of information is properly discoverable and does
15 not constitute a ruling on any potential objection to the discoverability, relevance,
16 or admissibility of any documents or other material sought in discovery, and the
17 Parties reserve their right to object to discovery on any appropriate ground.

18 **8. Miscellaneous Provisions**

19 The Parties intend that this Order shall be consistent with the local rules of
20 this Court and with the Court's Scheduling Order. Nothing in this Order shall

1 prevent disclosure as required by law or compelled by order of any court. Nothing
2 in this Order shall be construed to permit the disclosure of classified information or
3 information the disclosure of which is prohibited by statute.

4 **9. Termination of Litigation**

5 The provisions of this Order shall continue to be binding after final
6 termination of this Litigation. Within forty-five (45) days after final conclusion of
7 all aspects of this Litigation, including any appeals, any Party or person who
8 received Confidential Information must destroy those documents and materials and
9 the portions of all other material containing Confidential Information prepared in
10 connection with this Litigation (other than Counsel's copies of exhibits filed under
11 seal with the Court; Counsel's file copies of papers prepared in connection with
12 this action, *e.g.*, pleadings, court papers and other papers served in this Litigation;
13 and Counsel's file copies of expert reports, depositions and trial transcripts, and
14 any other documents and records that are required to be retained by a Party under
15 applicable law) and provide written notice to the Producing Person.

16 **10. Producing Persons' Reliance on Order**

17 Production of Covered Information will be made in express reliance upon
18 the terms of this Order.
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1 **11. Consent to Jurisdiction**

2 Receiving Parties hereby agree to subject themselves to the jurisdiction of
3 this Court for the purpose of any proceedings relating to the performance under,
4 compliance with, or violation of, this Order.

5 **12. Additional Parties**

6 The terms of this Order shall be binding upon all current and future parties
7 to the Litigation and their counsel, all persons identified in section 2(b) above, and
8 all Producing Persons.

9 **13. Use of Own Information**

10 Nothing in this Order shall impose any restriction on the use of or disclosure
11 by a Party of its own information. Nor shall this Order be construed to prevent a
12 Party from disclosing Covered Information to any person whom the document
13 clearly identifies as an author, addressee, or carbon copy recipient of such
14 document.

15 **14. Binding on Parties**

16 Execution of this Protective Order by Counsel shall constitute a
17 representation by Counsel that they, all persons employed by their firm who have
18 access to Covered Information, and the Party or Parties they represent, will abide
19 by the terms of this Protective Order and will subject themselves to the jurisdiction
20 of this Court for purposes of enforcement and disciplinary action.

1 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
2 Order and provide copies to the parties.

3 DATED March 4, 2022.

4 *s/Mary K. Dimke*
5 MARY K. DIMKE
6 UNITED STATES DISTRICT JUDGE
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EXHIBIT A
Endorsement of Protective Order

I, _____, have read the Protective Order (“Order”) filed in the case entitled Okanogan Highlands Alliance and State of Washington v. Crown Resources Corporation and Kinross Gold U.S.A., Inc., Case No. 2:20-CV-00147-MKD (“Action”), and agree to be bound by its terms and consent to the continuing jurisdiction of the District Court for the Eastern District of Washington for the resolution of any disputes arising under and/or concerning the subject matter of the Order.

I understand that all Confidential Information I may be shown or receive are subject to the Order. Upon request, I will provide all interested parties with an executed copy of this Exhibit A and with a list of all materials covered by the Order that have been received by me.

I further agree that upon final disposition of the Action, in which I am a participant or have otherwise been retained, I will return the Confidential Information to the Producing Person or, in the alternative, destroy the Confidential Information and provide the Producing Person with a certification of that destruction.

Dated:

Signature

Print Name

Firm/Company Name

Address

Telephone